

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL G. BROWN,

Defendant-Appellant.

UNPUBLISHED

August 13, 2002

No. 232675

Wayne Circuit Court

LC No. 00-006940

Before: Talbot, P.J., and Cooper and D.P. Ryan*, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of and sentence for aggravated stalking, MCL 750.411i, entered after a jury trial. We affirm defendant's conviction, set aside the sentence in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with aggravated stalking on the ground that he had a previous conviction for stalking. MCL 750.411i(2)(d). The fact of defendant's previous conviction was established by evidence presented in the prosecution's case-in-chief. In addition, defendant testified and acknowledged that in the previous case he pleaded guilty of stalking, but contended that much of what was alleged in that case was fabricated. Over defendant's objection the prosecutor called Annette Walton, the complainant in the previous case, who testified that defendant threatened her by leaving a card in her door with a message stating that she belonged to him. The jury found defendant guilty as charged. The trial court sentenced defendant to thirty-two months to twelve years in prison.

Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party and tending to weaken or impeach that evidence. Whether rebuttal evidence is proper depends on the proofs introduced by the defendant, and not merely to what he testified on cross-examination. If the evidence responds to evidence introduced by or to a theory developed by the defendant, it is proper rebuttal. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). The admission of rebuttal evidence is within the discretion of the trial court. *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues the trial court abused its discretion by admitting rebuttal evidence in the form of Walton's testimony. We disagree and affirm defendant's conviction. Defendant introduced the issue of the truth of the allegations that resulted in the charge of stalking against Walton when he contended that much of what was alleged in that case was fabricated. Defendant's contention that that charge was based on untruths opened the door for rebuttal to contradict his evidence. *Pesquera, supra*. Contrary to defendant's assertion, the rebuttal evidence did not pertain to a purely collateral issue. The credibility of a witness is a material issue. *People v Layher*, 238 Mich App 573, 580; 607 NW2d 91 (1999), *aff'd* 464 Mich 756; 631 NW2d 281 (2001). The rebuttal evidence had a direct bearing on defendant's credibility.

Even if we were to assume *arguendo* that the rebuttal evidence did not specifically contradict defendant's testimony and thus was improperly admitted, we would deem the error harmless under the circumstances. Defendant's assertion that the jury convicted him of the instant offense based on Walton's testimony is speculative. Other evidence supported the jury's verdict. Defendant has not established that it is more probable than not that any error affected the outcome of the case. *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999).

Defendant argues he is entitled to be resentenced because the trial court imposed a maximum term of twelve years imprisonment which is greater than that permitted by statute. We agree. A conviction of aggravated stalking is punishable by a maximum term of five years in prison. MCL 750.411i(3)(a). Defendant was on notice that the prosecution would seek sentence enhancement under MCL 769.11(1)(a). The trial court was authorized to impose a maximum term no longer than twice that prescribed by law, MCL 769.11(1)(a), in this case ten years. At sentencing, the trial court sentenced defendant as an habitual offender under MCL 769.12(1)(a) and imposed a maximum term authorized by that statute. MCL 769.12(1)(a). Because defendant was on notice of sentence enhancement under MCL 769.11(1)(a), the maximum allowable term is ten years.

We affirm defendant's conviction, set aside the sentence in part, and remand for correction of the judgment of sentence to reflect the maximum term allowed under MCL 769.11(1)(a), ten years.¹ We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Jessica R. Cooper

/s/ Daniel P. Ryan

¹ Defendant does not challenge the validity of his minimum term of thirty-two months, which was within the applicable statutory sentencing guidelines. We set aside only that portion of the sentence, the maximum term, that is invalid. MCL 769.24; *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994).